Petition

81-749

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

No._____

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD SHIRES WINSON, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

Whether the Sixth Amendment guarantee of confrontation is denied when the preliminary hearing testimony of an absent witness was introduced during probation revocation proceedings, despite the trial court's finding the witness was not legally unavailable for purposes of introducing that testimony at the substantive criminal trial.

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No. _____

THE PEOPLE OF THE STATE OF CALIFORNIA,

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RICHARD SHIRES WINSON, JR.,

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

Petitioner, the People of the State of California respectfully requests a writ of certiorari issue to review the judgment of the California Supreme Court, which was entered on July 23, 1981, and became final on August 23, 1981. (Cal. Rules of Court, Rule 24a.)

OPINION BELOW

The opinion of the California Supreme Court may be found at 29 Cal.3d 711, ___ Cal.Rptr. ___. A copy of the opinion appears as Appendix A to this petition.

JURISDICTION

The judgment of the California Supreme Court became final on August 23, 1981. This petition for writ of certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have

been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. History of the Case

A two-count information filed by the District Attorney of San Diego County on March 2, 1978, charged respondent Richard Shires Winson, Jr. with attempted armed robbery during which a weapon was used (Pen. Code, § 211, 12022(b)), and with assault with a deadly weapon. (Pen. Code, § 245(a).) It was additionally alleged great bodily injury

was inflicted upon the victim. (Pen. Code, § 12022.7.) (CT 1.)1/

On April 26, 1978, respohdent pled guilty to count II pursuant to a plea bargain whereby the district attorney dismissed the other count. (CT 2-3.) On May 26, 1978, respondent was placed on probation for three years on the condition he serve 365 days in the county jail. (CT 4.)

After being released from custody on discharge on November 29, 1978, respondent was arrested on December 20, 1978, on charges of attempted robbery and assault. (CT 7-8.) On January 9, 1979, the preliminary hearing in the later offense was held.

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1. CT refers to the clerk's transcript of the proceedings in the superior court.

Pre-trial motions on the subsequent case were argued on March 15 and 16. The trial court, after noting the victim of the later assault was absent, found that the prosecution had not used due diligence in attempting to locate him, and ruled the preliminary hearing testimony of the witness could not be admitted at trial. (CT 22-23.) On March 19, 1979, a motion to dismiss these charges was granted. (CT 24.)

Respondent's probation revocation hearing began April 13, 1979. (CT 21.) On April 23, 1979, the trial court ruled the absent witness' preliminary hearing testimony would be admitted in the probation revocation hearing. Thereafter, appellant's probation was revoked. (CT 22, 10.) Respondent was then sentenced to the upper term of four years. (CT 10-11.) Respondent filed a

timely notice of appeal from the revocation of his probation. (CT 12-13.)

On July 23, 1981, the California Supreme Court reversed the revocation of respondent's probation on the ground he was denied his Sixth Amendment right to confrontation. (Appendix A.)

B. Statement of Facts

At approximately 5:00 p.m. on December 19, 1978, Gerald Winther, the victim, ate dinner at the Cafe Maya Restaurant. Inside the establishment were both respondent and Mike May. He had known the latter approximately six months and said to him, "How's it going?" When he had finished his dinner, Winther

went outside and walked down an alley near Georgia Street. (PHT 27-31.)2/

Shortly after hearing footsteps, Winther was pushed against a wall by May, who said, "Up your money." At this time, respondent pulled a knife on Winther and put it to his jaw, cutting him on the right side. Both May and respondent repeated, "Up your money." May then pulled Winther down and respondent stabbed the victim in the back of the head and hit him with a hard object, possibly the blunt end of the knife. Winther yelled for help and for someone to call the police. The two assailants then left the area. (PHT 32-39.) Corrinne Pike lived in an apartment whose bedroom window opened onto the alley.

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2. PHT refers to the preliminary hearing transcript of the proceedings in the municipal court which were introduced during the hearing on revocation of respondent's probation.

Between 5:00 and 5:30 p.m. on December 19, 1978, she heard scuffling noises in the alley and heard a voice identified as Mr. May's say "shut up." She then heard someone yell for help and to call the police. In response to these pleas, Ms. Pike did call the police. (PHT 9-12.)

Officer Copher of the San Diego Police Department contacted the victim on the sidewalk near the alley. The victim gave the officer descriptions of the two assailants. One was described as being Mexican-looking, standing about five feet ten inches, weighing approximately 165 pounds, and having teardrop tatoos by his eye. Three days after the incident, the victim immediately identified respondent's picture from a photographic lineup

saying as he made his selection, "He's the one with the knife." (RTM 64-75.)3/

Appellant was arrested during the early morning hours of December 20, 1980. At the time of his arrest, he was in the company of Mike May. Both men were carrying knives. (RTM 78; PHT 65-69.)

Defense testimony at the probation hearing produced Lisa A. Wennstrom who said in talking to the victim immediately after the assault, she had supplied respondent's name and had asked the victim if the assailant had teardrop tatoos. (RTM 89-90.)

Respondent testified he had run into May in the restaurant by accident, and had left before May. After leaving

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3. RTM refers to reporter's transcript of the various motions made during proceedings in the superior court.

the restaurant, appellant went to his apartment and fell asleep about 5:30 p.m. May later entered respondent's apartment through a window, and began watching TV while respondent slept. Some time between 12:00 and 1:00 a.m., a Richard Atteberry stopped by saying he had some work for respondent. Respondent was on his way to Atteberry's when arrested. (RTM 93-96.)

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question regarding the extent of the constitutional guarantee of confrontation, particularly as it applies to probation revocation proceedings: whether the constitutional guarantee of confrontation is denied when the preliminary hearing testimony of an absent witness is introduced at probation revocation proceedings, despite the trial

court's finding the witness was not legally unavailable for purposes of introducing that testimony at trial.

In rendering its decision in People v. Winson (1981) 29 Cal.3d 711, the California Supreme Court held the use of an absent witness' preliminary hearing testimony violated the federal Constitution's due process requirements for probation revocation hearings under Morrissey v. Brewer (1972) 408 U.S. 471, and Gagnon v. Scarpelli (1973) 411 U.S. 778, where there has been no showing the witness was unavailable.

The State of California believes that while confrontation is guaranteed to probationers during revocation hearings, that right has been protected when the probationer, during a preliminary hearing on the substantive underlying criminal charge, has had ample

opportunity to cross-examine his accuser. When that witness is later absent at the time of the criminal trial the previously recorded testimony should be admissible in probation revocation hearings without requiring the prosecution make the same showing of legal unavailability as is required to warrant the introduction of this testimony at the criminal trial.

It has been long held that while the right to confrontation does attach to probation revocation hearings, hearsay evidence may be introduced even though such evidence would be inadmissible at a criminal trial. If the confrontation applicable in probation revocation hearings acquires the presence of the victim, unless the prosecution can make the same legally unavailable showing necessary for purposes of introducing that testimony at trial, the efficient

operation of the probation revocation system will be severely impaired. This case, therefore, is of extreme importance in California, and has ramifications nationwide.

ARGUMENT

THE TRIAL COURT PROPERLY ADMITTED THE PRELIMINARY HEARING TRANSCRIPT OF THE ABSENT WITNESS AT THE PROBATION REVOCATION HEARING, EVEN THOUGH THAT WITNESS WAS NOT FOUND LEGALLY UNAVAILABLE FOR PURPOSES OF INTRODUCING HIS TESTIMONY AT SUBSTANTIVE CRIMINAL TRIAL

Petitioner, the People of the State of California, respectfully requests this Court grant this petition for writ of certiorari to consider the fundamental question of whether an absent witness' preliminary hearing transcript is properly admissible for purposes of a probation revocation hearing, even though that witness has not been found legally unavailable for purposes of introducing

the same testimony at the underlying criminal trial.

Obviously, this issue brings into play the extent to which the right to confrontation, guaranteed by the Sixth Amendment, is applicable to probation revocation proceedings. An analysis of this question, in turn, brings two additional areas of inquiry into focus: First, the degree of the due process necessary to ensure a fair revocation proceeding; and second, the circumstances in which an absent witness' testimony may be introduced at a judicial proceeding. Synthesizing the issue even further, this Court is being asked to decide whether the due diligence which must be exercised before an absent witness' testimony may be introduced at a criminal trial is equally applicable at a probation revocation setting.

The genesis of any analysis into the due process requirements of a probation (or parole) revocation hearing is this Court's opinions in Morrissey v. Brewer (1972) 408 U.S. 471, and Gagnon v. Scarpelli (1973) 411 U.S. 778. In Morrissey, this Court for the first time concluded the federal Constitution mandated certain minimum due process safeguards apply in the parole revocation setting. Among these safeguards was the right to confront and cross-examine adverse witnesses. This finding was required to protect the interests of both the parolee and the State. Recognizing that the revocation process was not part of the criminal prosecution, however, this Court concluded,

> "The full panoply of rights due a defendant in such a proceeding does not apply to parole revocation." (408 U.S. at 480.)

In discussing what was called flexible due process, this Court never failed to recognize the difference between the criminal trial and revocation.

> "Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole." (408 U.S. at 483.)

Thus, the court sought to establish through an informal hearing a procedure which afforded the trier of fact an opportunity to exercise an informed discretion based on verified facts and an accurate knowledge of the parolee's behavior. (408 U.S. at 484.) At no time, however, was a revocation hearing equated with a criminal prosecution. To the contrary, this Court allowed the process to be flexible enough

to consider "letters, affidavits and other material that would not be admissible in an adversary criminal trial." (408 U.S. at 489.)

In Gagnon v. Scarpelli, supra, decided by this Court the year after Morrissey, supra, this Court extended the minimum due process requirements applicable to parole revocation hearings to probation revocation proceedings as well. (411 U.S. at 785.)

California adopted the Morrissey -- Gagnon standards through the decision rendered in People v. Vickers (1972) 8 Cal.3d 451. Since that time, a number of cases have reexamined the extent of the due process afforded an individual at revocation proceedings. Very few cases, however, have considered the application of the right to confrontation

applicable in such hearings when dealing with an absent witness.

In Commonwealth v. Quinlan (1977) 380 A.2d 854, the victim of an alleged rape did not testify at the revocation hearing. Rather, the probation officer and the two police officers who investigated the crime testified to the circumstances of the alleged sexual assault. The judge hearing the matter, however, found good cause to excuse the victim from testifying, finding that requiring her to testify would have subjected her to unnecessary embarrassment and harassment. In addition, it was noted the victim had been cross-examined at great length by counsel at the preliminary hearing. (380 A.2d at 857.)

A case directly in point, yet one which the California Supreme Court

chose to distinguish, is People v. Cambitsis (1980) 101 Cal.App.3d 141. In Cambitsis, an absent witness' preliminary hearing testimony was introduced at the probation revocation hearing without any showing of unavailability. In so ruling, the Cambitsis court declared the requirement of unavailability loosened in the setting of probation revocation hearings. (101 Cal.App.3d at 146.) This loosening was not done in the context of the court having an opportunity to observe a witness' demeanor. In fact, Cambitsis noted such observations were, "'secondary and dispensable.'" (101 Cal.App.3d at 145; 5 Wigmore, Evidence (3d ed. 1940) § 1395, 1396; see Appen. C for full text of statute.) Nor did it do so because there was another witness who personally testified at the probation revocation hearing.

Rather, it did so on the grounds the absent witness had been cross-examined at the preliminary hearing and,

> "It is doubtful that cross-examination at the probation revocation hearings would have been any more extensive or thorough than it was at the preliminary hearing." (101 Cal.App.3d at 145.)

In fact, the court concluded the loosening of the requirement of unavailability was mandated:

> "So long as the defendant in the formal proceeding was afforded the right, and had a similar motive to cross-examine the witness, and the record of the cross-examination is provided to the court in the probation revocation hearing, it would appear that 'substantial compliance with the purposes' of the rule adequately provides the defendant in a probation revocation hearing the right to confront and cross-examine witnesses guaranteed by Morrissey and Gagnon." (101 Cal.App.3d at 146.)

Thus, the issue has been synthesized to its core. To what extent, if any, does due process require unavailability be shown before an absent witness' testimony can be properly at a probation revocation hearing?

This Court, through its decisions in California v. Green (1970) 399 U.S. 149, and Ohio v. Roberts (1980) 448 U.S. 56, has made it clear that under certain circumstances the pre-recorded testimony of an absent witness may be introduced even in the arena of a criminal trial which, as noted, does invoke the full panoply of rights guaranteed by the Constitution.

Succinctly stated, the circumstances warranting the introduction of such testimony are: (1) the witness whose testimony is sought to be introduced, is unavailable; that is, despite a

good faith effort by the prosecution the witness' attendance was not procured. (Ohio v. Roberts, supra, 448 U.S. at 74; Barber v. Page (1968) 390 U.S. 719, 724-725); and, (2) the evidence to be introduced must have sufficient indicia of reliability to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement. (Ohio v. Roberts, supra, 448 U.S. at 65, citing Mancusi v. Stubbs (1972) 408 U.S. 204, 213; California v. Green, supra, 99 U.S. at 161.[4/]

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4. The introduction of former testimony in California is governed by Evidence Code sections 1291 and 240.

Section 1291 provides:

"(a) Evidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and:

"(1) The former testimony is offered against a person who offered it in evidence in his own

As concerns the opportunity to cross-examine both Roberts and Green held

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Footnote 4 continued:

behalf on the former occasion or against the successor in interest of such person; or

"(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (See Appen. B for full text of statute.)

Section 240 provides:

"(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is:

"(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;

"(2) Disqualified from testifying to the matter;

the cross-examination which occurred at the preliminary hearing afforded "'substantial compliance with the purposes behind the confrontation requirement' . . . no less so than classic cross-examination." (Ohio v. Roberts, 448 U.S. at 68-69; California v. Green, 399 U.S. at 166.) The very "accounterments of the preliminary hearing" guaranteed the trustworthiness of the evidence. (448 U.S. at 73.)

Footnote 4 continued:

"(3) Dead or unable to attend or to testify at the hearing because of then existing physical or mental illness or infirmity;

"(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

"(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

In the instant matter, it is irrefutable the second factor authorizing introduction was met. The victim of the assault was present at the preliminary hearing, and was subjected to cross-examination by counsel. Moreover, a transcript of that examination was submitted to the trial court prior to the taking of additional live testimony at the revocation hearing.

What is missing is the finding by the trial court the witness was legally unavailable. Rather, the court, in "an awful close" decision ruled the prosecution had failed to exercise reasonable diligence in procuring the witness' attendance at trial, thereby refusing to

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Footnote 4 continued:

. . . . . ."

(See Appen. B for full text of statute.)

allow the preliminary hearing testimony to be admitted at trial.5/ Without further hearing, however, the trial court ruled the testimony admissible for purposes of a revocation hearing.6/

This Court should affirm the trial court's decision. It must be remembered the full panoply of rights attendant to the criminal trial are not present in revocation hearings. While one of the minimum due process requirements applicable in revocation proceedings is the right to confront and

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5. Although petitioner cannot now argue the wisdom of this aspect of the trial court's decision, a far greater showing was made of the effort to locate the witness than was made in Ohio v. Roberts, supra.

6. The California Supreme Court decision (People v. Winson (1981) 29 Cal. 3d 711, 715) makes reference to the deputy district attorney informing the trial court he could produce the witness at the revocation hearing. Petitioner has been unable to substantiate this reference in the record.

cross-examine adverse witnesses, the fact remains confrontation was "substantially" afforded when respondent was able to cross-examine the victim at the preliminary hearing.

Moreover, as revocation hearings were never thought to be equated with criminal trials there appears to be no constitutional mandate to strictly apply the unavailability requirement. Respondent has already been validly found guilty of the crime for which he was originally placed on probation. While petitioner does not suggest this Court give blanket approval to every failure of the prosecution to obtain the personal attendance of a witness, where the prosecution has exercised good faith, albeit not perhaps due diligence, in obtaining that witness, no good reason emerges for

allowing the probationer to escape with impunity.

In the instant case, there was no question the prosecution had made a good faith attempt to obtain the witness. What the prosecution failed to do, in the eyes of the trial court, was exercise reasonable diligence; in other words, the search for the witness began too close to the actual time of trial. This failure, however, in no way impeded the trial court from exercising an informed discretion, based upon verified facts, in concluding respondent had violated probation. (See Morrissey v. Brewer, supra, 408 U.S. at 484.) Indeed, every essence of fair play was present in the revocation. Respondent's claim he was denied confrontation was not based on a failure to have cross-examined the victim, but rather on the "legal" finding

the witness was not unavailable. Had the trial court ruled the witness was unavailable, not only would the preliminary hearing transcript have been admitted at trial, there would be no question as to its admissibility at the revocation hearing as well.

Morrissey and Gagnon sought to ensure conditional liberties of parolees and probationers could not arbitrarily be snatched away. To prevent this a system of initial preliminary hearings and subsequent revocation hearings were said to be constitutionally mandated. Within this mandate was encompassed a conditional right to an attorney, as well as, inter alia, notification of the charges against the individual and a right to confront and cross-examine adverse witnesses. Where a probationer

has cross-examined a witness at a preliminary hearing this right to confrontation has been satisfied.

If this Court concludes the prosecution has to sustain the same strict standard of exercising reasonable diligence in procuring the personal attendance of witnesses at revocation proceedings the revocation process will evolve into a traditional adversary system. No longer will hearsay evidence be admissible. (Morrissey v. Brewer, supra, 408 U.S. at 489.) Such an evolution will have a drastic effect on the efficient operation of the revocation process.

In order to avoid this consequence, this Court should adopt the reasoning of the California Court of Appeal in People v. Cambitsis, surpa, wherein the requirements of unavailability, given the cross-examination of

the absent witness which occurred at the preliminary hearing, was "loosened" in the revocation setting. This loosening of the first prong to the introduction of an absent witness' testimony will permit the revocation process to continue to operate smoothly, while at the same time ensuring that the minimum due process requirements necessary to protect a parolee or probationer's interests are not diminished.

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CONCLUSION

For the foregoing reasons, it is respectfully submitted the petition for writ of certiorari be granted.

Respectfully submitted,

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Appendix A

[Filed July 23, 1981]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CRIM. NO. 21675

(Sup.Ct.No. CR-42770)

THE PEOPLE, Plaintiff and Respondent,	)
v.	)
RICHARD SHIRES WINSON, JR., Defendant and Appellant.	)

A preliminary hearing transcript of a witness' testimony in a defendant's related criminal case is not a proper substitute for the live testimony of the witness at defendant's probation revocation hearing in the absence of the declarant's unavailability or other good cause.

We have reached the foregoing conclusion in reviewing the revocation of

defendant's probation imposed following his 1978 conviction of assault with a deadly weapon. Defendant was placed on formal probation for three years, the conditions of which included one year's confinement in the county jail and compliance with all state laws. Three weeks after his release from county jail, he was arrested and charged with two offenses, an attempted robbery and an assault with a deadly weapon against Winther (victim).

-- SEE CONCURRING OPINION --

At defendant's preliminary hearing on the new charges the victim testified that on December 19, 1978, he saw defendant and codefendant Mike May in a San Diego restaurant. He exchanged greetings with May, ate dinner, and left the restaurant. As the victim walked

through an adjacent alley, May grabbed him from behind, shoved him against a wall, and demanded money. According to the victim, defendant then drew a knife, placing it against the victim's jaw. In an ensuing struggle, defendant cut the victim along the jaw and stabbed him in the back of the head.

Residents from a nearby apartment house, including Lisa Wennstrom, an acquaintance of defendant and May, responded to the victim's cries. Lisa had seen neither the confrontation nor the assailants, but the victim told her he was attacked by "Mike," a blond stocky man, and a tall, dark, "male Mexican." Wennstrom supplied Mike's last name, and after inquiring whether the other man had a mustache and teardrop tattoos on his face, told the victim that the man was probably "Richard."

Shortly thereafter, defendant was arrested in the company of May and a third man at which time both defendant and May were carrying knives. The victim identified May from a photographic lineup supplied by police on the night of the attack. Three days later he similarly identified defendant from a second photographic lineup.

On February 27, 1979, defendant was given notice to show cause why his probation should not be revoked. On March 16, 1979, and after the victim had left the state, an evidentiary hearing was held on the prosecution's request to utilize the transcript of defendant's preliminary hearing at the forthcoming criminal trial. Concluding that the prosecution had not exercised due diligence in attempting tc locate and maintain contact with the victim, the court denied

use of the transcript, and thereafter dismissed the criminal charges arising from the assault.

Subsequent proceedings then focused on defendant's probation revocation hearing. He objected to use of the transcript of the victim's preliminary hearing of its proposed intended use, hearsay, and a denial of the rights to confrontation, cross-examination, and due process. Although no further information regarding the victim's availability was offered, the prosecutor stated that the victim could be found and produced at the hearing. Without explanation the court rejected defendant's objections, ruled that the transcript could be used, and it was thereafter read at the revocation hearing. The court also heard additional testimony from Wennstrom and two investigating police officers. The victim was

not produced, although the prosecutor again repeated his belief that the victim might be available. Rejecting defendant's alibi, the court thereupon found that he had violated his probation and sentenced him to four years in state prison on the original offense. He appeals.

Defendant contends that the trial court erred in admitting and considering the preliminary hearing transcript as evidence at his probation revocation proceeding. Pointing to the court's earlier ruling that the prosecution had not exercised due diligence in maintaining contact with the victim, defendant argues that use of the transcript denied him his due process rights to confront and cross-examine adverse witnesses. We consider whether the court may, at the probation revocation hearing and without a further showing or explicit

finding of good cause, use the preliminary hearing transcript over defense objections.

It is fundamental that both the People and the probationer or parolee have a continued post-conviction interest in accurate fact-finding and the informed use of discretion by the trial court. The probationer or parolee's concern is "to insure that his liberty is not unjustifiably taken away and the State['s] to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." (Gagnon v. Scarpelli (1973) 411 U.S. 778, 785; People v. Coleman (1975) 13 Cal.3d 867, 873-874.)

The People, relying on People v. Cambitsis (1980) 101 Cal.App.3d 141, defend the trial court's admission and

use of the transcript. They stress that defendant at the preliminary hearing had an adequate opportunity to cross-examine the witness, and that the use of hearsay evidence at such hearings has been judicially approved.

While the People's argument has a surface appeal, we are unable to reconcile it with the minimum due process standards on parole revocation hearings as defined by the United States Supreme Court. In Morrissey v. Brewer (1972) 408 U.S. 471, the court observed that "We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." (408 U.S. at p. 480.) The high court distinguished criminal and parole revocation proceedings. Referring

to the latter, it observed that "the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial." (P. 489.) The court nonetheless insisted that among the minimum parole revocation procedures required by due process is "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); . . ." (Ibid, italics added.)

Thereafter in Gagnon v. Scarpelli, supra, 411 U.S. at page 782, the high tribunal extended the Morrissey protections to probationers. Answering the contention that interstate probation violations would cause "difficulty and expense [in] procuring witnesses," the

court "emphasize[d] that we did not in Morrissey intend to prohibit use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence." (411 U.S. at pp. 782-783, fn. 5; italics added.) We faithfully applied the Morrissey/Gagnon requirements to state probationers in People v. Vickers (1972) 8 Cal.3d 451.

In criminal trials, the right to confront and cross-examine adverse witnesses, constitutionally protected by the confrontation clause of the Sixth Amendment to the federal Constitution, is strongly preferred although not absolute. Recently, the high tribunal in examining the interaction of the confrontation clause and the hearsay rule, observed "The Court has emphasized that the

Confrontation Clause reflects a preference for face-to-face confrontation at trial, and that 'a primary interest secured by [the provision] is the right of cross-examination." (Ohio v. Roberts (1980) 448 U.S. 56, 63, fn. omitted.) The court cautioned that the rule is not absolute and restricts rather than bars all hearsay, noting, however, that "In the usual case (including cases where prior cross-examination has occurred), the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." (Id., at p. 65, italics added.) If a witness is unavailable, the "statement is admissible only if it bears adequate 'indicia of reliability.'" (Id., at p. 66.)

The Cambitsis court characterized the opportunity to cross-examine

an adverse witness as the "main and essential" purpose of the right of con-frontation, while describing as "secondary and dispensable" the opportunity for the tribunal to observe the witness' demeanor. (101 Cal.App.3d at 145.) The Supreme Court, however, has given equal weight to the latter purpose. Last year in Ohio v. Roberts, supra, the high tribunal, quoting from its holding in Mattox v. United States (1895) 156 U.S. 237, 242-243, noted that the confrontation clause "envisions 'a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the

manner in which he gives his testimony whether he is worthy of belief.' [Citation.]" (448 U.S. at pp. 63-64.) So important are these interests "that the absence of proper confrontation at trial 'calls into question the ultimate "integrity of the fact-finding process."' [Citation.]" (Ibid.) Thus the court has indicated that both interests -- cross-examination and the opportunity to observe the demeanor of the witness -- are not lightly to be disposed of in the criminal, fact-finding process. (See People v. Green (1969) 70 Cal.2d 654, 661 ["cross-examination neither may be nunc pro tunc nor may it be tunc pro nunc."].)

Our conclusion that a finding of good cause is required before the preliminary hearing transcript may be used at a revocation hearing is thus compelled by the high court's precise enunciation

of minimum due process requirements in such proceedings. It also is compelled by the emphasis of the Supreme Court on the equal value of cross-examination and the opportunity for observation of the witness' demeanor.

In addition, and within differ-ent contexts, our own prior interpretations of the enunciated Morrissey standards presage the result here. For example, in People v. Vickers we characterized the Morrissey require-ments as follows: "Adverse witnesses are to be made available for questioning by the parolee except when the hearing officer determines that an informant would be subject to risk of harm if his identity were disclosed." (8 Cal.3d at p. 457.) Similarly, in In re Bye (1974) 12 Cal.3d 96, in discussing the rights of those outpatients who are in civil addict

programs but threatened with revocation of their outpatient status, we affirmed that before termination of such status they are entitled to Morrissey protections including the right to cross-examine adverse witnesses.

In In re Coughlin (1976) 16 Cal.3d 52, in like fashion, we examined procedures for revocation of probation following acquittal on criminal charges. Rejecting petitioner's claim that the probation revocation hearing subjected him to double jeopardy, we stated "The proceeding took the form of a trial, with the presence of witnesses and the introduction of evidence, only because due process principles required such a hearing for petitioner's own protection." (16 Cal.3d at p. 61, italics added.)

Finally, in People v. Ramirez (1979) 25 Cal.3d 260, we held that a

California Rehabilitation Center (CRC) inpatient is entitled to a hearing before exclusion from CRC. Analyzing the due process rights to be afforded such inmates, we concluded that because the decision is "evaluative" in nature and based on "specialized subjective judgment . . . rather than on the existence of particular and contestable facts" (25 Cal.3d at p. 275), confrontation and cross-examination need not be afforded the patient. We distinguished the inpatient's interests from those of an outpatient on the basis of lack of a liberty interest in the latter. (In re Bye, supra, 12 Cal.3d at p. 96.) We therefore held the formal Morrissey procedures were not entirely applicable.

We cannot accept the People's suggestion that if the same evidence which was contained in the transcript had

been summarized in the probation officer's report it would have been sufficient to revoke defendant's probation. Only a summary revocation of probation to preserve jurisdiction may be based upon a parole or probation officer's report. (People v. Vickers, supra, 8 Cal.3d at pp. 460-461; Pen. Code, § 1203.2.) In such cases the parolee or probationer must thereafter be given a Morrissey hearing with its attendant due process protections "to afford the defendant an opportunity to require the Authority to establish that the alleged violations did in fact occur and justified the revocation." (Vickers, at p. 460.)

We emphasize that within this context the right of confrontation is not absolute. Confrontation may be denied if the trier-of-fact finds and expresses good cause for doing so. Thus, the risk

of harm to an informant may suffice to deny a parolee the right to confrontation (Morrissey v. Brewer, supra, 408 U.S. at p. 487; People v. Vickers, supra, 8 Cal.3d at p. 457.) Generally, if the witness is legally unavailable, the former testimony may be admitted. Similarly, where "appropriate," witnesses may give evidence by document, affidavit or deposition (Gagnon, 411 U.S. at p. 782, fn. 5; Morrissey, supra, at p. 487 [the parolee "may bring letters, documents, or individuals who can give relevant information to the hearing officer"]; In re Bye, supra, 12 Cal.3d, at p. 110, fn. 15.) In California, the Evidence Code specifically authorizes the use in later proceedings of previous testimony of a witness currently "unavailable" as that term is statutorily defined. (§§ 240 and 1290 et seq.)

The issue of whether former testimony may be utilized in lieu of a witness' personal appearance is best resolved on a case-by-case basis. (See Note, The Impossible Dream?: Due Process Guarantees for California Parolees and Probationers (1974) 25 Hastings L.J. 602, 611-612.) In the case before us the following circumstances, in combination, persuade us that the preliminary hearing transcript was improperly admitted into evidence: the testimony at issue was that of the sole percipient witness to the alleged parole violation, a finding of no legal unavailability was made in the underlying proceedings in which the charges were then dismissed, no additional evidence was introduced which established the witness' unavailability, and the court made no specific finding of

good cause for denying the right to confront and cross-examine.

The judgment is reversed and the cause is remanded to the trial court for further proceedings consistent with this opinion.

RICHARDSON, J.

WE CONCUR:

Bird, C.J.
Tobriner, J.
Mosk, J.
*Kingsley, J.
*Klein, J.

* Assigned by the Chairperson of the Judicial Council.

PEOPLE V. WINSON

Crim. 21675

CONCURRING OPINION BY NEWMAN, J.

I concur, but would have based the opinion on the California rather than the federal constitution.

NEWMAN, J.

PEOPLE V. WINSON

Crim. 21675

COUNSEL FOR PARTIES:

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San Diego County No. 42720

Hon. G. D. Adams

Appendix B

Section 1291 of the California Evidence Code, states:

"(a) Evidence of former testimony is not made inadmissiable by the hearsay rule if the declarant is unavailable as a witness and:

"(1) The former testimony is offered against a person who offered it in evidence in his own behalf on the former occasion or against the successor in interest of such person; or

"(2) The party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an

interest and motive similar to that which he has at the hearing.

"(b) The admissibility of former testimony under this section is subject to the same limitations and objections as though the declarant were testifying at the hearing, except that former testimony offered under this section is not subject to:

"(1) Objections to the form of the question which were not made at the time the former testimony was given.

"(2) Objections based on competency or privilege which did not exist at the time the former testimony was given."

Section 240, California Evidence Code, states:

"(a) Except as otherwise provided in subdivision (b), 'unavailable as a witness' means that the declarant is:

"(1) Exempted or precluded on the ground of privilege from testifying concerning the matter to which his statement is relevant;

"(2) Disqualified from testifying to the matter;

"(3) Dead or unable to attend or to testify at the hearing because of then existing physical or

mental illness or infirmity;

"(4) Absent from the hearing and the court is unable to compel his attendance by its process; or

"(5) Absent from the hearing and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance by the court's process.

"(b) A declarant is not unavailable as a witness if the exemption, preclusion, disqualification, death, inability, or absence of the declarant was brought about by

the procurement or wrong-
doing of the proponent of
his statement for the pur-
pose of preventing the
declarant from attending
or testifying."

Appendix C

5 Wigmore, Evidence (3d ed. 1940) section 1395 provides:

> "In the period when the hearsay rule was being established, and ex parte depositions were still used against an accused person (§ 1364 supra), we find him frequently protesting that the witness should be 'brought face to face,' or that he should be 'confronted' with the witnesses against him. The final establishment of the hearsay rule in the early 1700s meant that this protest was sanctioned as a just one -- in other words, that confrontation was required. What was, in principle, the meaning and purpose of this

confrontation? So far as there is a rule of confrontation, what is the process that satisfies this rule?

"It is generally agreed that the process of confrontation has two purposes, a main and essential one, and a secondary and dispensable one:

"(1) The main and essential purpose of confrontation is to <u>secure for the opponent the opportunity of cross-examination</u>. The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and

personal putting of questions and obtaining immediate answers.

"That this is the true and essential significance of confrontation is clear, from the language of counsel and judges from the beginning of the hearsay rule to the present day:

". . . . . .

Thus the main idea in the process of confrontation is that of the opponent's opportunity of cross-examination; the former is merely the dramatic feature, the preliminary measure, appurtenant to the latter.

"The following historical incident is a telling illustration of the value of confrontation as an expedient for

subjecting witnesses to cross-examinations:

". . . . . .

"(2) There is, however, a secondary advantage to be obtained by the personal appearance of the witness; the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. This subordinate advantage has been expounded in the following passages:

". . . . . .

"This secondary advantage, however, does not arise from the confrontation of the opponent and the witness; it is

not the consequence of those two being brought face to face. It is the witness' presence before the tribunal that secures this secondary advantage--which might equally be obtained whether the opponent was or was not allowed to cross-examine. In other words, this secondary advantage is a result accidentally associated with the process of confrontation, whose original and fundamental object is the opponent's cross-examination."

5 Wigmore, Evidence (3d ed. 1940) section 1396 provides:

> "The question, then, whether there is a right to be confronted with opposing witnesses is essentially a question whether there is a right to cross-examine. If there has been a cross-examination, there has been a confrontation. The satisfaction of the right of cross-examination (under the rules examined §§ 1371-1393 supra) disposes of any objection based on the so-called right of confrontation.
>
> "Nevertheless, the secondary advantage, incidentally obtained for the tribunal by the witness' presence before it--the demeanor-evidence--is

an advantage to be insisted upon whenever it can be had. No one has doubted that it is highly desirable, if only it is available. But it is merely desirable. Where it cannot be obtained, the requirement ceases. . . . It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which special value is attached; and just as the original of a document (§ 1192 supra) or a preferred witness (§ 1308 supra), may be dispensed with in case of unavailability, so demeanor-evidence may be dispensed with, in necessity. Accordingly, supposing that the indispensable requirement of

cross-examination has been satisfied, the only remaining inquiry is whether the deameanor-evidence, to be obtained by the witness' production before the tribunal, is available.

"This inquiry--the conditions of unavailability of demeanor-evidence, by reason of death, illness, and the like --remains now to be made.

"But first the effect must be considered of the constitutional sanction, in the United States, of the principle of confrontation; for this has sometimes erroneously affected the judicial attitude towards demeanor-evidence." (Fn. omitted.)

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

AFFIDAVIT OF SERVICE BY MAIL

[illegible], being duly sworn, deposes and says: That affiant is over the age of 18 years, and not a party to the within action; that affiant's place of employment and business address is 110 West "A" Street, Suite 700, San Diego, California 92101; that on the 21 day of September, 19 81, affiant enclosed one true copy of the within

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

in an envelope for each of the persons named below, addressed to each of them at the address set out immediately below each respective name, sealed said envelope, and deposited the same in the United States Mail at the City of San Diego, County of San Diego, State of California, with postage thereon fully prepaid; that there is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the said place of mailing and each of the places so addressed.

That all parties required to be served have been served as shown below:

Andrew Freemen, Deputy
Office of the State Public Defender
110 West "C" Street, Suite 2101
San Diego, California 92101

Clerk of the Court
California Supreme Court
3580 Wilshire Boulevard, Room 213
Los Angeles, California 90010

Robert D. Zumwalt, Clerk
San Diego Superior Court
220 West Broadway
San Diego, California 92101
FOR DELIVERY TO THE HONORABLE
G. DENNIS ADAMS, JUDGE

Honorable Edwin Miller
San Diego District Attorney
220 West Broadway, Room 7002
San Diego, California 92101

Robert L. Ford, Clerk
Court of Appeal, Fourth
Appellate District, Division One
1350 Front Street, Room 6010
San Diego, California 92101
FOR DELIVERY TO THE HONORABLE
GERALD BROWN, PRESIDING JUSTICE

[illegible]

Subscribed and sworn to before me
this 21ST day of September,
19 81.

[illegible]
NOTARY PUBLIC in and for the County of
San Diego, State of California.

KAREN K. [illegible]
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 03, 19[illegible]

SD CL-3 (11/78)

Opposition

ORIGINAL

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No. 81-749

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

RICHARD SHIRES WINSON, JR.,

Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION TO PROCEED IN FORMA PAUPERIS

QUIN DENVIR
State Public Defender

ELAINE A. ALEXANDER
Chief Assistant State Public Defender

ANDREW FREEMAN
Panel Attorney

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No. 81-749

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,	]
Petitioner,	]
v.	]
RICHARD SHIRES WINSON, JR.,	]
Respondent.	]

On Petition for a Writ of Certiorari
to the California Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Richard Shires Winson, Jr., respectfully requests that this Court deny the petition for writ of certiorari to the California Supreme Court in this case.

I. PROCEDURAL HISTORY

On May 26, 1978, respondent Richard Shires Winson, Jr., was placed on probation after pleading guilty to a charge of assault with a deadly weapon (Cal. Penal Code § 245). He was arrested on December 20, 1978, on new charges of attempted robbery (Cal. Penal Code § 211) and assault with a deadly weapon against one Gerald Winther. Winther testified at the January 9, 1979, preliminary hearing on the new charges but could not be located on March 16, at the time of the trial on those charges and the hearing to revoke respondent's probation

on the original conviction. The trial court ruled that the prosecution had not used due diligence in keeping track of Winther. It dismissed the new charges, but at the probation revocation hearing the court, over respondent's objection, admitted into evidence the transcript of Winther's testimony at the preliminary hearing. Respondent's probation was revoked primarily on the basis of this evidence, and he was sentenced to four years in state prison.

On appeal respondent argued that the use of the preliminary hearing transcript denied him the constitutional right to confront adverse witnesses at his probation revocation hearing. The California Supreme Court agreed and reversed the order revoking probation in an opinion entered July 13, 1981, People v. Winson, 29 Cal.3d 711 (Pet. for Cert., Appendix). The California Attorney General's application for stay of execution and enforcement of the judgment of the California Supreme Court was denied by Justice William H. Rehnquist on October 2, 1981.

II. REASONS FOR DENYING THE PETITION

The petition for writ of certiorari should be denied because the decision of the California Supreme Court in this case accurately interprets this Court's decisions concerning the requirements of due process in probation revocation hearings and the meaning of the right to confrontation.

This Court has held that principles of due process guarantee the right to confront and cross-examine adverse witnesses at a probation revocation hearing unless the trial court specifically finds good cause for not allowing confrontation. Morrissey v. Brewer (1972) 408 U.S. 471, 489 [33 L.Ed.2d 484; 92 S.Ct. 2593]; Gagnon v. Scarpelli (1973) 411 U.S. 778, 782 [36 L.Ed.2d 656; 93 S.Ct. 1756]. This Court has also held that the guarantee of confrontation includes, not

only the right to cross-examine, but also the right to require adverse witnesses to appear personally and face the trier of fact, so that the trier may judge their credibility by their demeanor. Barber v. Page (1968) 390 U.S. U.S. 719, 721 [20 L.Ed.2d 255; 88 S.Ct. 1318]; Ohio v. Roberts (1980) 448 U.S. 56, 63 [65 L.Ed.2d 597; 100 S.Ct. 2531].

Applying these principles, the California Supreme Court in this case held, in a virtually unanimous decision[1/], that the recorded testimony of Gerald Winther was improperly admitted into evidence. Winther was the victim and sole percipient witness to the alleged probation violation, and therefore the need for live confrontation and an opportunity to test his credibility before the trier of fact, in person, was especially acute. Further, Winther's unavailability was due to the lack of due diligence on the part of the prosecution, not to "good cause" as required by this Court. Under these circumstances, the California court held, respondent was denied due process at his probation revocation hearing.

The California Supreme Court's decision was a correct, reasonable, and carefully limited application of principles already announced in this Court's decisions. It was hardly revolutionary; petitioner points to not a single case in direct conflict with it and to only one--a readily distinguishable decision of the California intermediate Court of Appeal--which even contains language in possible conflict with it. Despite petitioner's fear that requiring prosecutors to use reasonable diligence in procuring the attendance of key witnesses at probation revocation hearings will cause an "evolution" that

---

1/ Justice Newman concurred but would have based the opinion on the California Constitution. (Pet. for Cert., Appendix, A-21.)

will ultimately have a "drastic effect" on the revocation process (Pet. for Cert., p. 30), that speculation is as far-fetched as it sounds and is unsupported by any showing that the efficiency of the process depends on denying confrontation in cases such as this.

Petitioner, in short, has given this Court no good reasons for granting certiorari. The petition should be denied.

A.

In establishing minimal due process standards for parole and probation revocation proceedings, this Court has included "the right to confront and cross-examine adverse witnesses." Morrissey v. Brewer, supra, 408 U.S. 471, 489; Gagnon v. Scarpelli, supra, 411 U.S. 778, 782; see also People v. Vickers (1972) 8 Cal.3d 451, 457-458. The right to confrontation and cross-examination is expressly guaranteed under these decisions, even though in general revocation proceedings are not to be equated with adversary criminal trials and some evidence inadmissible at trial, such as letters, affidavits, and reports, may be considered. Morrissey v. Brewer, supra, 408 U.S. at 489.

B.

Although confrontation may be denied upon a finding of good cause (Morrissey v. Brewer, supra, 408 U.S. at 489), there was no valid reason for the trial court to consider the preliminary hearing testimony of the absent witness at respondent's probation revocation hearing. The prosecutor did not attempt to claim or prove "good cause" in this case. The only reason he could offer for asking Winther's recorded testimony be received in evidence was that Winther's whereabouts

were no longer known by that time. However, the trial court found that the prosecution had failed to exercise due diligence in securing Winther's presence. For that reason, Winther's unavailability did not amount to good cause for disallowing confrontation. The suggestion by petitioner that there is a new standard to be considered--"where the prosecution has exercised good faith, albeit not perhaps due diligence, in obtaining the witness" (Pet. for Cert., p. 27)--is unfounded both in fact and in law.

C.

Morrissey and Gagnon spoke of the right to "confront and cross-examine" witnesses. (Emphasis added). The chance to have the trier of fact observe the witness is a vital aspect of confrontation. As this Court observed in Ohio v. Roberts, supra, 448 U.S. 56, 63: "[T]he Confrontation Clause reflects a preference for the fact-to-face confrontation...." This Court further explained in Barber v. Page, supra, 390 U.S. 719, 721:

> "Many years ago this Court stated that '[t]he primary object of the [Confrontation Clause of the Sixth Amendment]...was to prevent depositions or ex parte affidavits... being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.' Mattox v. United States, 156 US 237, 242-243, 39 L.Ed. 409, 411, 15 S. Ct. 337 (1985)." (Emphasis added).

This aspect of the right to confrontation thus serves a constitutionally significant function, and it may not be denied, as petitioner would seem to allow, without good reason. The absence of a witness because of the People's negligence is not a good reason for denying this right.

D.

Generally, if the witness is legally unavailable, the former testimony may be admitted. Similarly, where "appropriate," witnesses may give evidence by document, affidavit, or deposition. (Gagnon v. Scarpelli, supra, 411 U.S. at 782, fn. 5; Morrissey v. Brewer, supra, 408 U.S. at 487 [the parolee "may bring letters, documents, or individuals who can give relevant information to the hearing officer"]; In re Bye (1974) 12 Cal.3d 96, 110, fn. 15). In California, the Evidence Code specifically authorizes the use in later proceedings of previous testimony of a witness currently "unavailable" as that term is statutorily defined. (Sections 240 and 1290 et seq.).

The issue of whether former testimony may be utilized in lieu of a witness' personal appearance is best resolved on a case-by-case basis.

As the California Supreme Court said in this case:

> "We emphasize that...the right of confrontation is not absolute. Confrontation may be denied if the trier-of-fact finds and expresses good cause for doing so." (Pet. for Cert., Appendix, A-17).

The right to test the witness in all available ways was particularly important in this case. The missing witness was the key to the prosecution's case--the victim, the only eyewitness, and the sole source of information concerning the facts of the crime and the identity of the

perpetrators. Winther's credibility was very much in issue, and his demeanor on the stand could have been a critical factor.

In these respects this case is quite different factually and legally from People v. Cambitsis (1980) 101 Cal.App.3d 141, on which petitioner relies heavily. (Pet. for Cert., pp. 19-20, 30-31). In Cambitsis, the witness whose recorded testimony was read gave evidence that was only cumulative and indirectly incriminating. Whatever the possible tolerance of the Due Process Clause for denial of personal confrontation under those circumstances might be, it hardly extends to a case such as the present one, where the missing witness was the key to the entire case.

The California Supreme Court's decision does not change the existing procedure for probation revocations, as suggested by petitioner. All it does is require that the prosecution do what it always has been required to do at probation revocations. Unless good cause is shown (as extensively defined by California and federal law), the prosecution must on request produce its witnesses, who will then be subject to confrontation and cross-examination. If good cause is shown, the prosecution will be permitted to use alternative methods of proof, such as using an absent witness' preliminary hearing testimony.

The California court's decision is a reasonable and correct application of existing principles as enunciated by this Court. It does not effect a significant change in the present law or practice. Petitioner has stated no substantial grounds which would warrant this Court's exercising its certiorari jurisdiction. The petition should be denied.

III. CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Dated this 6 day of January, 1982, at San Diego, California.

Respectfully submitted,

QUIN DENVIR
State Public Defender

Elaine A. Alexander
ELAINE A. ALEXANDER
Chief Assistant State Public Defender

ANDREW FREEMAN
Panel Attorney

Attorneys for Respondent

EAA:AF:ll
1/4/82

No. 81-749

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,	]
Petitioner,	]
v.	]
RICHARD SHIRES WINSON, JR.,	]
Respondent.	]

On Petition for Writ of Certiorari

to the California Supreme Court

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Richard Shires Winson, Jr., by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to rule 46.

Respondent has been represented by appointed counsel at trial, on appeal, and in these post-appeal proceedings.

Elaine A. Alexander

ELAINE A. ALEXANDER
Chief Assistant State Public Defender

Attorney for Respondent

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED IN FORMA PAUPERIS

I, Elaine A. Alexander, being duly sworn, depose and say in support of the motion to proceed in forma pauperis:

I am a member of the bar of the United States Supreme Court.

I hold the position of Chief Assistant State Public Defender and throughout the appeal of this case have represented Richard Shires Winson, Jr., respondent herein.

I have had no contact with Mr. Winson since the fall of 1980. In August of 1981, I spoke on the telephone with Mr. Richard McCoy, an attorney from Souix City, Iowa, who stated that he was representing Mr. Winson in a criminal matter in that state. When I called Mr. McCoy in September of 1981, in an effort to find Mr. Winson, however, he informed me that he did not know his then-current whereabouts and to his belief Mr. Winson had been returned to California authorities. Since then I have tried but have been unable to locate Mr. Winson through the California state prison information system, through his probation officer, and through local addresses and contacts we had during the early stages of the appeal. For these reasons, I have been unable to obtain Mr. Winson's affidavit in support of this motion.

However, I have substantial reason to believe that Mr. Winson is entitled to proceed in forma pauperis. Throughout the proceedings in this appeal, Mr. Winson has been found by the California courts to be indigent. A copy of Mr. Winson's declaration of indigency, as originally submitted to the San Diego County Superior Court and acted upon by both the California Court of Appeal and the California Supreme Court, is attached to this motion and affidavit. In view of his recent record of incarceration and his apparent instability in terms of residence, I have reason to believe that Mr. Winson's condition of indigency has not changed.

Therefore, as attorney for respondent, I ask that respondent be given leave to proceed in forma pauperis, without prepayment of costs or fees.

1/6/82 _____

ELAINE A. ALEXANDER
Chief Assistant State Public Defender

Attorney for Respondent

TO 1968 CA (6 74)
(Individual)

TITLE INSURANCE AND TRUST
A TICOR COMPANY

STATE OF CALIFORNIA
COUNTY OF SAN DIEGO } ss

On January 6, 1982 before me, the undersigned, a Notary Public in and for said State, personally appeared Elaine A. Alexander

_____, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same.

WITNESS my hand and official seal.

Signature Avis Julia Kelso

STAPLE HERE

OFFICIAL SEAL
AVIS JULIA KELSO
NOTARY PUBLIC CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires September 19, 1983

(This area for official notarial seal)

Robert A. Mulvaney, Esq.
600 "B" Street, Suite 1800
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Telephone: 238-1010

Attorney for Defendant
Richard S. Winson

FILED
JUN 14 1979
COTTRELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. RICHARD S. WINSON, Defendant.	No. CR 42770 MOTION FOR APPOINTMENT OF COUNSEL ON APPEAL BY DEFENDANT

I, RICHARD S. WINSON, defendant and appellant in the above-entitled proceeding, now pending in the Court of Appeal of the State of California, Fourth Appellate District, Division One, do hereby request the Court to appoint an attorney to represent me in this proceeding.

In support of this request, I declare that I have no means of retaining an attorney to represent me, and that I have no income or assets.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 6-11-79

A. Mulvaney for Richard Winson
Defendant and Appellant

Defendant requests that his counsel in the Superior Court not be appointed. Counsel does not consent to the appointment.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I served a copy of Respondent's Brief in Opposition and Motion to Proceed in Forma Pauperis on petitioner by depositing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

George Deukmejian
Attorney General
110 West A Street, Suite 700
San Diego, California 92101

Clerk
California Supreme Court
4250 State Building
350 McAllister Street
San Francisco, California 94102

All parties required to be served have been served.

Done this 6 day of January, 1982.

Elaine A. Alexander

ELAINE A. ALEXANDER
Chief Assistant State Public Defender
Office of the State Public Defender
110 West C Street, Suite 2102
San Diego, California 92101

Attorney for Respondent.